

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEIRTON USA, INC.,

Plaintiff,

v.

U.S. CUSTOMS AND BORDER
PROTECTION,

Defendant.

Case No. C20-1734-RSM

ORDER DENYING EX PARTE MOTION
FOR TEMPORARY RESTRAINING
ORDER

I. INTRODUCTION

This matter comes before the Court on Plaintiff Keirton USA, Inc. (“Keirton”)’s Motion for a Temporary Restraining Order (“TRO”) against Defendant U.S. Customs and Border Protection (“CBP”). Dkt. #2. As of the date of this Order, it appears that Defendant CBP has not been served with notice of the instant action, making consideration of Plaintiff’s motion *ex parte*. For the reasons set forth below, the Court DENIES Keirton’s Motion.

II. BACKGROUND

Keirton is a Washington company that manufactures and imports parts, components, and finished agricultural equipment (“Goods”) from Canada, China, Taiwan and Japan to its location

1 in Ferndale, Washington. Dkt. #2 at 3. Goods imported by Keirton include components for the
2 “Twister Trimmer,” which is a machine that separates branches from leaves and crop heads and
3 vacuums the waste of agricultural processing. Dkt. #4 at ¶ 3. The product lines produced by
4 Keirton contain at least one imported part. *Id.* at ¶ 11. To ensure that Goods will only be used
5 for lawful purposes, Keirton enters agreements with end users requiring that the users not sell
6 Keirton’s products to “anyone who may seem to be engaged in or intend to engage in illegal
7 activity” and provides that Keirton “will not put Goods in any materials that would be
8 construed—either by content or placement—as soliciting the business of persons engaged in or
9 intending to engage in illegal activity.” *Id.* at ¶ 6 (citing Dkt. #4-1)).
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11 On October 7, October 15, and November 11, 2020, CBP agents seized Keirton’s Goods
12 on the basis they were being introduced into the United States “contrary to law.” Dkt. #2 at 4.
13 Pursuant to the seizure, CBP issued three Notices of Seizure dated October 26, 2020 and an
14 additional Notice of Seizure dated November 17, 2020. *See* Dkt. #4-3 at 1-29. Keirton contends
15 that the Goods seized in this case are either intended for lawful use or do not yet have an end
16 user, and therefore are not being imported for an unlawful purpose. Dkt. #4 at ¶ 9. Keirton
17 further claims that without the ability to import Goods, it “will soon have to lay off all of its
18 employees and close the business permanently.” *Id.* at ¶ 11. Keirton estimates that based on the
19 company’s current inventory and demand, it can remain open no later than December 31, 2020,
20 but “there is a chance the business could close within the next 15 days.” Dkt. #3 at ¶ 6.
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22 On November 23, 2020, Keirton filed the instant TRO seeking an order compelling CBP
23 to return to Keirton the Goods that were formally seized and/or detained by CBP, to enjoin CBP
24 from detaining and seizing Keirton’s imported Goods until a hearing on a preliminary injunction
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1 is held, and to enjoin CBP from initiating administrative or civil forfeiture proceedings against
2 Keirton. Dkt. #2 at 14-15.

3 **III. DISCUSSION**

4 **A. Legal Standard**

5 Motions for temporary restraining orders without notice to and an opportunity to be heard
6 by the adverse party are disfavored and will rarely be granted. Local Civil Rule (“LCR”)
7 65(b)(1). Federal Rule of Civil Procedure 65(b) states that the court may issue a temporary
8 restraining order without written or oral notice to the adverse party or its attorney only if specific
9 facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury,
10 loss, or damage will result to the movant before the adverse party can be heard in opposition and
11 the movant certifies in writing any efforts made to give notice and the reasons why it should not
12 be required. Unless these requirements are satisfied, the moving party must serve all motion
13 papers on the opposing party before or contemporaneously with the filing of the motion and
14 include a certificate of service with the motion. LCR 65(b)(1).
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18 As an initial matter, it appears that Defendant CBP has not been properly served pursuant
19 to Fed. R. Civ. P. 4(a)(1). Dkt. #5. However, Plaintiff does not appear to be seeking relief
20 without notice. It recently filed a praecipe to issue summons in response to the notice of filing
21 deficiency, indicating it is attempting to serve Defendant. *See* Dkt. #6. Given the analysis below,
22 the Court will not deny this Motion for failure to provide notice.
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24 Typically, to succeed on a motion for temporary restraining order, the moving party must
25 show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving
26 party in the absence of preliminary relief; (3) that a balance of equities tips in the favor of the
27 moving party; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def.*
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1 *Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The Ninth Circuit
2 employs a “sliding scale” approach, according to which these elements are balanced, “so that a
3 stronger showing of one element may offset a weaker showing of another.” *Alliance for the Wild*
4 *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). However, the moving party must still
5 make at least some showing that there is a likelihood of irreparable injury and that the injunction
6 is in the public interest. *Id.* at 1135. Furthermore, courts impose a heightened burden where the
7 moving party, as here, “asks the court to disturb the status quo rather than maintain it.” *Cent.*
8 *Freight Lines, Inc. v. Amazon Fulfillment Servs., Inc.*, No. C17-0814JLR, 2017 WL 2954426, at
9 *2 (W.D. Wash. July 10, 2017). In such cases, courts must deny such relief “unless the facts and
10 law clearly favor the moving party.” *Id.* (citing *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320
11 (9th Cir. 1994)).
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14 The Court has reviewed Plaintiff’s Motion and finds it has failed to demonstrate a
15 likelihood of irreparable harm to Plaintiff in the absence of emergency relief. “The threat of
16 being driven out of business” may establish irreparable injury. *Am. Passage Media Corp. v. Cass*
17 *Comm’ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985). However, courts recognize that
18 “declarations by the plaintiff-entity’s own management, standing alone, are usually not enough
19 to show that the plaintiff’s ongoing business concern would be threatened without injunctive
20 relief.” *Nulife Ventures, Inc. v. Avacen, Inc.*, No. 20-CV-2019-BAS-KSC, 2020 WL 6150440,
21 at *2 (S.D. Cal. Oct. 20, 2020); *see also Am. Passage Media Corp.*, 750 F.2d at 1474 (Statement
22 of actual revenue losses in foregoing year and predicted losses in following year by company’s
23 CEO was insufficient, standing alone, to show plaintiff was threatened by risk of being driven
24 out of business).
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1 Here, Plaintiff relies on the declarations of Keirton's CEO, Jay Evans, and Keirton's
2 Director of Manufacturing, Jason Fluckiger. *See* Dkts. ##3, 4. Both of these declarations offer
3 conclusory assertions that Keirton will close by December 31, 2020, and possibly sooner, unless
4 Keirton is permitted to import the Goods. *See* Dkt. #3 at ¶ 6 (“[T]here is a chance the business
5 could close within the next 15 days.”); Dkt. #4 at ¶ 11 (“Without the ability to import Goods,
6 Keirton will soon have to lay off all of its employees and close the business permanently.”).
7 Without providing any basis for Mr. Evans' or Mr. Fluckiger's conclusions, these declarations
8 are insufficient, on their own, to show that the demise of Keirton's business is “imminent” unless
9 emergency relief is granted. *See Nulife Ventures, Inc.*, 2020 WL 6150440, at *2; *cf. hiQ Labs,*
10 *Inc. v. LinkedIn Corp.*, 938 F.3d 985, 993 (9th Cir. 2019) (Finding irreparable harm based on
11 threat to business' survival where “[t]he record provides ample support for that finding.”).
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14 Keirton also argues that it faces irreparable harm in the form of damage to its goodwill
15 with business contacts and reputation in the business community. Dkt. #2 at 13. Again, however,
16 Keirton makes no effort to substantiate these conclusory assertions. *Cf. Life Alert Emergency*
17 *Response, Inc. v. LifeWatch, Inc.*, 601 F. App'x 469, 474 (9th Cir. 2015) (unpublished) (Finding
18 declarations reporting “numerous and persistent complaints from would-be customers” and
19 “emails and social media posts from consumers” as material substantiating irreparable harm
20 based on threats to plaintiff's reputation and goodwill). Indeed, the Fluckiger declaration states
21 that an unspecified number of Goods “do not yet have an end user,” Dkt. #4 at ¶ 9, making it
22 unclear the extent to which Keirton would suffer damaged goodwill or reputation from unfulfilled
23 orders.
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26 For these reasons, the Court concludes that Keirton has failed to satisfy the heightened
27 burden necessary to warrant mandatory preliminary injunctive relief. *See Stanley*, 13 F.3d at
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1 1320. Because Keirton fails to show likely irreparable harm, the Court need not address the
2 remaining elements to obtain preliminary injunctive relief. *See Winter*, 555 U.S. at 20; *Cottrell*,
3 632 F.3d at 1134–35. Accordingly, the Court DENIES Keirton’s motion.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court DENIES Keirton’s TRO Motion, Dkt. #2.
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8 DATED this 24th day of November, 2020.
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12 RICARDO S. MARTINEZ
13 CHIEF UNITED STATES DISTRICT JUDGE
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